TEAM 34

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

C.A. No. 21-000123
CONSOLIDATED WITH
C.A. No. 21-000124

CHESAPLAIN LAKE WATCH,

Plaintiff-Appellant-Cross Appellee,

And

THE STATE OF NEW UNION,

Plaintiff-Appellee-Cross Appellee

v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellant.

On Appeal from the United States District Court for the District of New Union in consolidated case nos. 66-CV-2020 and 73-CV-2020, Judge Romulus N. Remus.

Brief of CHESAPLAIN LAKE WATCH

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INTRODUCTION

With the Clean Water Act (CWA), Congress committed to "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." Clean Water Act of 1972, 33 U.S.C. § 1251(a). In pursuit of this sweeping policy, Congress directed the United States Environmental Protection Agency (EPA) to attain water quality suitable for the protection and propagation of fish, shellfish, and wildlife and recreation. § 1251(a)(2). Nearly 50 years after the statutory deadline and despite the waters' importance as a source of drinking water, aquatic habitat, economic stimulus, and more, the nation is nowhere near reaching that goal. *See* EPA, NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS, at 7 (2017) (finding that nearly half of nation's miles of rivers and streams are in poor biological condition). This case is about EPA's complacency in allowing the country's water pollution problem to deepen.

According to EPA, 70% of the acres of lakes surveyed by the states were considered impaired, or "unable to support one or more of the uses designated for them by the state." *Id.* at 11. Despite the severity of the water pollution problem in the U.S., Lake Chesaplain continues to add to the problem. Lake Chesaplain has historically supported jobs, recreation, and a thriving tourism economy. Without adequate EPA oversight, phosphorus pollution will continue to impair the lake to the detriment of its water quality, biological productivity, and the economies that depend on them.

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 because this case involves a federal question implicating 33 U.S.C. § 1313(d). The Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 because the district court entered final judgment on August 15, 2021. R16. Chesaplain Lake Watch (CLW), the State of New Union (New Union), and EPA each filed timely notices of appeal. R2.

STATEMENT OF ISSUES PRESENTED

I. Whether CLW's claims are ripe when EPA issued a final TMDL and CLW members would suffer hardships from continued decline in their ability to use and enjoy Lake Chesaplain for recreation, its water quality, and its biological productivity.

II. Whether the district court erred by vacating EPA's TMDL when the meaning of "total maximum daily load" is ambiguous, and EPA has permissibly interpreted the term for three decades.

III. Whether a TMDL can regulate pollution on an annual basis using a percentage-based, five-year phased approach when the plain language of § 1313(d)(1)(C) requires that TMDLs regulate pollution on a "daily" basis, allow for seasonal variations, and ensure that the impaired waterbody will meet WQS upon implementation.

IV. Whether EPA arbitrarily and capriciously decided not to require reasonable assurances that the best management practices would be implemented to reduce nonpoint source pollutants when nonpoint source pollution reduction is essential to meeting New Union's Water Quality Standards and the goals of the CWA.

STATEMENT OF THE CASE

A. Factual Background

Prior to the 1990s, Lake Chesaplain had exceptional water quality, and it was prized for its swimming beaches and fishing opportunities. R7. For the last three decades, though, pollution caused by economic development has degraded the water quality and biological productivity of Lake Chesaplain. R7. As a result, recreation, fish habitat, and the tourism economy have deteriorated. R7. This led New Union to designate Lake Chesaplain as an impaired water in 2014. R8. Since its impairment designation, the exceptional qualities that once made Lake Chesaplain so attractive for recreation and development have not been restored. R8.

Lake Chesaplain is a 55-mile-long, five-mile-wide natural lake located in New Union. R7. The west side of Lake Chesaplain is bordered by Chesaplain National Forest and Chesaplain State Park, which collectively offer hiking trails, fishing, boat ramps, a public beach, and a campground. R7. The east side of the lake is bordered primarily by agricultural land and lakefront vacation communities. R7. The City of Chesaplain Mills is located at the north end of the lake. R7. Lake Chesaplain's outlet is the Chesaplain River, which is a navigable-in-fact interstate water. R7. The lake is a Class AA water, the classification reserved for highest quality waters of the state. R8. The designated uses are drinking water source, primary contact recreation (swimming), and fish propagation and survival. R8.

The growth of industry and a parallel boom in housing development beginning in the mid-1990s created a phosphorous pollution crisis in Lake Chesaplain. R7. Fueling this crisis are discharges from ten large-scale hog facilities (CAFOs), a slaughterhouse producing 50 million pounds of product annually, residential septic systems, agricultural operations, and the Chesaplain Mills municipal sewage treatment plant. R7. Excess phosphorus loading from these sources has caused blooms of summer algae, which have consumed so much of the lake's dissolved oxygen that the lake has become unsuitable normal biological productivity. R8, R9. The blooms also have produced an objectionable odor and reduced water clarity, such that the water has become unsuitable for recreation. R8.

In response to the lake's deteriorating condition, New Union established the Lake Chesaplain Study Commission (Commission) in 2008. R8. In 2012, the Commission published a report outlining the water quality criteria for dissolved oxygen, phosphorous, and water clarity necessary to maintain normal biological productivity and primary uses. R8. The Commission determined that the lake could not exceed a phosphorous concentration of 0.014 mg/l. R8. At that time, phosphorous levels were between 0.02 to 0.034 mg/l. R8. The Commission's findings are undisputed facts. R9.

In 2014, the regulatory entity charged with implementing state-level CWA requirements, New Union Division of Fisheries and Environmental Control (DOFEC), adopted water quality criteria reflecting the Commission's findings and identified the lake as an impaired water pursuant to § 1313(d)(1)(A). R8. However, DOFEC did not submit a TMDL as required under § 1313(d)(1)(C). R8. EPA did not object to DOFEC's failure to submit the TMDL. R8. CLW, which is an organization comprised of members who depend on the lake's exceptional water quality and biological productivity for their use and enjoyment, served a notice to sue New Union and EPA due to this failure. R8. CLW agreed to forego litigation if EPA developed and implemented a TMDL sufficient to address excess phosphorous loading. R8. DOFEC thereafter commenced rulemaking to establish a TMDL. R8.

In July 2016, the Commission issued a supplemental report that New Union needed to reduce overall loading to a 120 metric ton (mt) annual maximum. R8. The findings indicated that nonnatural sources of phosphorous pollution contribute 82% of the annual load, and natural sources contribute the remaining 18%. R8, R9. Permitted polluters account for 34% of the annual load, and unpermitted polluters account for 48% of the total annual load. R8, R9.

In October 2017, DOFEC publicly noticed a proposal to implement a TMDL with an equal 35% phased-in reduction from individual sources. R9. Based on the Commission's 2015 existing annual loadings calculation of 180 mt, DOFEC calculated that a maximum annual load of 120 mt of phosphorous was necessary to reach the 0.014 mg/l water quality criterium. R8, R9.

Under the October 2017 DOFEC TMDL (TMDL I), point source load reductions would have been incorporated into National Pollution Discharge Elimination System (NPDES) permits under § 1342. R9. Nonpoint source reductions, which are not subject to § 1342, would have been achieved through voluntary implementation of best management practices (BMPs). R9. Though the CAFOs are point sources, they are exempt from § 1342 and regulated like nonpoint sources. Concentrated Animal

Feeding Operations, 40 C.F.R. § 122.23 (2021). The proposed BMPs would have included modified feeds for agricultural production, physical and chemical treatment of manure streams, and restrictions on manure spreading when the soil is frozen or saturated and runoff is most extreme. R9. Finally, homeowner septic BMPs would have increased inspections and expedited pumping schedules. R9.

The contents of TMDL I were highly controversial. R9. During the comment period, CLW asserted that a 35% phased annual reduction was inconsistent with the CWA requirement for a TMDL. R10. CLW also objected to EPA taking any credit for nonpoint source phosphorus reductions, arguing that the proposed BMPs would be insufficient to achieve a 35% reduction, and that New Union lacks statutory authority to enforce BMPs against agricultural sources. R9, R10. To remedy these deficiencies, CLW demanded that New Union require zero phosphorus discharges from the two point sources. R10. Additionally, homeowners, the slaughterhouse, and Chesaplain Mills also objected, arguing the 35% reductions and BMPs would be too onerous. R9.

Consequently, in July 2018, DOFEC adopted a second TMDL (TMDL II) with a 120 mt limit on total phosphorous loading. R10. TMDL II did not include the equal, 35% phased-in reductions from individual sources. R10. In May 2019, EPA rejected TMDL II and adopted TMDL I. R10.

B. Legal Background

Congress passed the CWA in 1972 in response to the lackluster performance of federal water pollution laws. *EPA v. California*, 426 U.S. 200, 202 (1976). The pre-1972 laws relied on water quality standards "specifying the acceptable levels of pollution in a State's interstate navigable waters as the primary mechanism...for the control of water pollution." *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002). The laws did not specify how governments would achieve those standards. *Id.*

The CWA provided that needed direction by establishing mechanisms for direct federal regulation of point source pollutants and federal oversight of state's nonpoint source pollution control programs. *Id.* Congress intended for states and the federal government to partner in working toward

the Act's ultimate goal: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

Pursuant to this partnership, states have primary authority over nonpoint source pollution control, with the EPA serving as a "backstop authority." *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 218, 289 (3d Cir. 2015). *See, e.g.*, § 1319(a) (giving states the first opportunity to enforce nonpoint source permit conditions, and transferring to EPA that authority if a state "has not commenced appropriate enforcement action" within 30 days); § 1342(b)–(d) (providing EPA authority to object to state permits and withdraw approval of a state's permit program); § 1344(h)–(j) (same); § 1370 (giving states the power to set and enforce pollutant limits only if those limits are more stringent than limits set under the CWA).

1. Water Quality Standards

Section 1313 of the CWA requires each state to adopt comprehensive water quality standards (WQS) for all waters within the state's jurisdiction. § 1313(a). The WQS must be designed "to protect the public health or welfare, enhance the quality of water and serve the purposes of" the CWA. § 1313(c)(2)(A). Further, a WQS must to be "sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation." *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 705 (1994).

In the WQS, states must identify the "designated uses" and "water quality criteria" appropriate for a water, considering its "use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes." § 1313(c)(2)(A). Once states adopt and EPA approves a WQS, states then must submit an impairment list, which identifies the jurisdictional waters that cannot meet WQS with only point source loading reductions. Water Quality

Planning and Management, 40 C.F.R. § 130.7(d)(1). The states prioritize the waters based on the severity of the pollution and established uses. *Id.*

2. Total Maximum Daily Loads

For each impaired water, states must develop, and EPA must approve a TMDL. 33 U.S.C. § 1313(d)(1)(C). Each TMDL must be "established at a level necessary to implement the applicable water quality standards with seasonal variations." *Id.*

The TMDL must allocate acceptable loading for point sources, nonpoint sources, and natural background pollutants. Water Quality Planning and Management, 40 C.F.R. § 130.2(g)–(i). To meet nonpoint source loading goals, states can enlist BMPs. § 130.2(m). BMPs are "methods, measures or practices" and can include structural and nonstructural controls and operation and maintenance procedures. *Id.* They can be implemented before, during, or after pollution-producing activities. *Id.* If the adoption of BMPs strengthens nonpoint source controls, agencies can lessen the stringency of point source controls. § 130.2(i).

After a TMDL has been adopted, states submit, and EPA must approve, a continuing planning process. § 1313(e). The continuing planning process guides states in implementing the TMDL in a way that aligns with the CWA's goals and policy under § 1251.

EPA has authority to approve or reject each step of the WQS standard-setting process. If EPA rejects a proposed WQS, list of impaired waters, or TMDL, then EPA is directed to establish its own WQS, list, or TMDL. § 1313(c)(3), (d)(2).

C. Procedural History

New Union and CLW filed actions under the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 702, on January 14, 2020, and February 15, 2020, respectively, in the District Court for the District of New Union. R10. New Union sought a declaration that EPA's rejection of TMDL II and the regulations EPA based its rejection on are unlawful. R10. CLW sought

an order compelling EPA to revise TMDL I to provide reasonable assurances Lake Chesaplain will meet established WQS. R11. The district court consolidated the cases, and the parties filed cross motions for summary judgment. R10, R11.

The district court granted summary judgment to New Union, holding that EPA's interpretation of "total maximum daily load" to include allocations for point source and nonpoint source reductions violated § 1313(d). R14. The district court also granted partial summary judgment to CLW on its first claim, holding that EPA's proposed phased-in annual reductions contravene the plain language of § 1313(d). R15. The district court denied summary judgment to CLW on its second claim, in favor of EPA, holding EPA's proposal to credit nonpoint sources for implementing BMPs to offset point source reductions was not arbitrary and capricious nor an abuse of discretion under APA § 702. R16.

CLW filed a timely Notice of Appeal challenging the district court's determinations that (1) EPA's interpretation of the term "total maximum daily load" to include individual allocations violated § 1313(d), and (2) EPA's proposal to credit nonpoint sources for implementing BMPs as an offset to point source reductions without reasonable assurances was not arbitrary and capricious or an abuse of discretion under APA § 702. R2.

STANDARD OF REVIEW

The Court reviews the district court's grant of summary judgment de novo. *See Doe v. Gates*, 981 F.2d 1316, 1322 (D.C. Cir. 1993). Pursuant to Fed. R. Civ. P. 56(a), the Court first determines whether there is any "genuine issue as to any material fact." If there is no genuine issue of material fact, the Court determines whether the proponent "is entitled to judgment as a matter of law." F. R. Civ. P. 56(a).

SUMMARY OF THE ARGUMENT

The district court correctly held that CLW's claim was ripe, and that EPA properly rejected TMDL I for failure to include load allocations. The district court erroneously held that EPA properly decided to phase-in annual pollution loading reductions over five years and to not require reasonable assurances that BMPs would be implemented. The Court should vacate TMDL II, reimplement TMDL I, and remand TMDL I to EPA to develop a TMDL consistent with § 1313(d)(1)(C).

I. The district court correctly determined CLW's claims are ripe for judicial review. First, CLW members' enjoyment of the lake has suffered because of algal blooms, an objectionable odor, reduced water clarity, and general impairment associated with excessive phosphorous loading and pollution. EPA and DOFEC must mitigate this harm by providing a TMDL that does not violate § 1313(d)(1)(C). Second, EPA's approval of TMDL I was an agency decision that had a direct and immediate bearing on DOFEC's mandate to implement a TMDL. Judicial review does not impede further agency action because TMDL I was final. Finally, the district court correctly determined the record is sufficiently developed to support CLW's claims, and the Court would not benefit from further factual development.

II. The district court erred by granting summary judgment for New Union on its allocations claim because the meaning of "total maximum daily load" is ambiguous, and EPA's interpretation is permissible. The phrase "total maximum daily load" may be interpreted as the sum of individual pollution sources, or a threshold "total" without reference to sources. Congress did not clearly define "total maximum daily load," nor did it clearly speak to the ambiguity in question. EPA's construction of the term is permissible because it has authority under § 1313(d) to approve or develop TMDLs, and it does not preempt the state's cooperative authority to implement TMDLs under § 1313(e).

III. The district court correctly granted summary judgment for CLW on its challenge to TMDL I because TMDL I fails to meet the minimum requirements of § 1313(d)(1)(C). The statute plainly requires that TMDLs regulate pollution on a daily basis, account for seasonal variations, and are sufficient to ensure that the impaired waterbody will meet the established WQS. Here, TMDL I fails to meet these requirements because it regulates pollution on an annual basis, makes no attempt to predict or account for seasonal variations, and uses a percentage-based approach that is insufficient to ensure that Lake Chesaplain will meet WQS.

IV. The district court erred by granting summary judgment for EPA on its reasonable assurances claim. EPA arbitrarily and capriciously failed to consider that nonpoint sources make up the majority of nonnatural pollutant loading in Lake Chesaplain and that New Union has refused to regulate nonpoint sources. Without considering these facts, EPA cannot credibly assert that the TMDL will achieve the WQS. Furthermore, EPA did not provide a reasoned explanation for not considering these facts. Finally, EPA arbitrarily and capriciously ignored its own interpretive document, which directs EPA to require reasonable assurances, without explanation.

ARGUMENT

I. CLW's claims are ripe

CLW's claims are ripe because CLW's members will be harmed until a TMDL that complies with the CWA is adopted. A pre-enforcement challenge to a regulation is ripe when the issues presented are fit for judicial review and the parties would suffer hardship if the suit was not heard. *Am. Farm Bureau Fed'n*, 792 F.3d at 293. To address issues of fitness and hardship of administrative actions, courts must find: (1) delayed review would not cause hardship to the plaintiffs; (2) judicial intervention would not interfere with further administrative action; and (3) the court would not benefit from further factual development of the issues. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998).

CLW's claims are fit for judicial review because EPA's adoption of TMDL I was a final agency decision, the record is well-developed, and CLW's members will be harmed if TMDL I is not remanded to EPA for revision.

A. Denying judicial review would cause hardship to CLW because TMDL I provides for annual maximum loads when the statute requires implementation of a daily maximum load

CLW members will continue suffering procedural hardship until the TMDL for Lake Chesaplain establishes loading limits that comply with the CWA. TMDLs must include a "daily" limit on pollution, so EPA ignored the plain language of the CWA by approving maximum "annual" loads. § 1313(d)(1)(C).

Courts have recognized that "an allegation of future injury may suffice [in a ripeness inquiry] if the threatened injury is certainly impending, or there is a substantial risk that harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). The CWA is comprised of procedural rules designed to reduce the threat of environmental harm, and statutory violations may constitute threatened harm. *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151–52 (9th Cir. 2000).

CLW's statements demonstrate "tangible, continuing connections to specific locations affected by the Agency decision they contest." *Id*. at 1146; R11. CLW has established that its members reside near and use Lake Chesaplain for swimming, boating, and fishing. R11. Further, CLW's affidavits establish that its members' enjoyment of those activities has been diminished by the decline in Lake Chesaplain's water quality. R11. As such, a TMDL that does not contain daily maximum loads perpetuates environmental harm to Lake Chesaplain and, by extension, CLW's members.

Considering EPA's procedural violations, CLW is not assured that TMDL I can attain water quality criteria necessary to restore the water quality and biological productivity its members depend

on. CLW's members will continue to suffer hardship until EPA carries out its mandate to implement a TMDL without violating the CWA.

B. Judicial review would not interfere with further action by EPA because its approval of TMDL I was a final agency decision

Judicial intervention would not interfere with further EPA action because the TMDL I reduction targets were final. TMDL I was a final agency action because it "contemplates specific NPDES permit limits for the point sources discharges," and those effluent limitations are automatically reviewable at the appellate level. R12; § 1369(b)(1).

EPA's approval of TMDL I was final because it imposed an affirmative duty on New Union to incorporate EPA's loading reduction targets into effluent limitations. § 1313(d)(1)(e), (b)(1)(A); *see also* R12 (permit "contemplates specific NPDES permit limits for the point sources discharges."). Effluent limitations are automatically reviewable on appeal because they impose an affirmative duty on the state to implement them. § 1369(b)(1) (providing for appellate review of "any determination approving or promulgating any effluent limitation or other limitation under [§ 1313(b)]"); *E. I. Du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977). Here, EPA has imposed constraints on New Union that implicate its duty to implement TMDLs under § 1313(e), so EPA's decision is automatically reviewable on appeal.

Below, EPA erroneously asserted that CLW's action was unripe because EPA had not yet approved an implementation plan. R12 (citing *Bravos v. Green*, 306 F. Supp. 2d 48 (D.D.C. 2004); *City of Arcadia v. EPA*, 265 F. Supp. 2d 1142 (N.D. Cal. 2003)). The district court correctly found the cases cited by EPA are inapposite. *Id.* Both cases involved scenarios where the challenged decision did not impose affirmative duties on the plaintiffs. In *City of Arcadia*, plaintiffs sued EPA alleging EPA arbitrarily and capriciously rejected a state trash TMDL and adopted its own. *Id*. at 1149. The court held that because a separate entity, Los Angeles County Department of Public Works, assumed

responsibility for compliance with the TMDL, EPA's decision—final or not—was not related to plaintiffs' hardship. *Id*. at 1156. Here, New Union bore sole responsibility for immediate implementation of the TMDL I NPDES permit requirements, so TMDL I imposed an affirmative duty on New Union. R12.

The legal argument in *Bravos* is likewise distinguishable because the challenge related to a different phase of the TMDL process. There, plaintiffs challenged EPA's approval of a TMDL implementation plan under § 1313(e) for not providing reasonable assurances that polluters would comply. *Bravos*, 306 F. Supp. 2d at 54. The court found that while EPA had approved the TMDL, it had not approved, and New Mexico had not developed, an implementation plan to carry it out. *Id.* at 56. As such, the claims had not ripened because plaintiffs challenged a phase of the TMDL process that had not occurred. *Id.* Here, New Union challenged a phase of the TMDL process that did occur. EPA developed and approved TMDL I under § 1313(d) with NPDES permit requirements that New Union was compelled to carry out through § 1313(e) planning and implementation. R12.

TMDL I imposes an affirmative duty on New Union to implement, "without delay," NPDES permit limits for point source discharges. R12. Therefore, TMDL I was automatically reviewable, final, and judicial intervention would not interfere with further agency action.

C. The factual record is well developed

The administrative record is well-developed, and the Court would not benefit from additional facts. The factual record is well developed when the court would not benefit from further factual development of the issues presented. *Am. Farm Bureau Fed'n*, 792 F.3d at 293.

The record shows that nonpoint sources are responsible for nearly half of the phosphorous loading in Lake Chesaplain. R9. Further, it details considerable opposition from nonpoint source polluters toward efforts to limit pollution linked to CAFOs, homeowners, and other agricultural dischargers by 35%. *Id.* Facing dischargers' record of opposition to complying with unenforceable

nonpoint source BMPs, the Court should be persuaded that both TMDL I and TMDL II are insufficient to achieve the Lake Chesaplain WQS. The Court should affirm the district court's finding of ripeness because denying judicial review would foreclose any action to remedy the TMDLs so that it complies with § 1313(d)(1)(C).

II. The Court should reverse summary judgment for New Union on its claim that EPA lacks authority to develop TMDLs with loading allocations

The district court erroneously held EPA does not have the authority to develop a TMDL including allocations for both point and nonpoint sources. First, the TMDL provision of the CWA is ambiguous. Second, EPA's interpretation is permissible because it preserves the principles of comity and federalism that Congress intended for the CWA.

An agency's construction of a statute that it administers is reviewed under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*. 467 U.S. 837, 842 (1984). The *Chevron* framework is a two-step analysis. First, the Court should look to the statute to determine Congress' intent. *Id.* at 842–43. "If Congress' intent is clear, the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Here, the Court should review the orders granting summary judgment for New Union under *Chevron* because "total" in "total maximum daily load" is ambiguous, and EPA's interpretation is permissible. Importantly, the D.C. and Third Circuits applied *Chevron* when reviewing EPA's construction of § 1313. *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006); *Am. Farm Bureau Fed'n*, 792 F.3d at 294.

A. The term "total maximum daily load" is ambiguous

Congress did not define the term "total maximum daily load," nor did it unambiguously imply its intent for the term. An agency interpretation of an ambiguous statute may stand if Congress has not clearly spoken to the ambiguity in question and the agency interpretation is permissible. *Chevron*, 467 U.S. at 842. If Congress left a statutory gap for an agency to fill, courts defer to the agency's reasonable decisions. *Am. Farm Bureau Fed'n*, 792 F.3d at 295. In determining whether the CWA admits a construction of "total maximum daily load" where "total" is the sum of point and nonpoint source load allocations, the district court correctly applied the *Chevron* standard but incorrectly applied the law to the facts. Congress left gaps for EPA to fill based on the language, legislative history, and structure of § 1313(d)(1)(C).

First, Congress did not define the term "total maximum daily load" and relied on EPA to elucidate the ambiguity. In *Natural Resources Defense Council v. Muszynski*, the Second Circuit held that § 1313(d) was unclear on whether a TMDL should be expressed in numeric or narrative terms. 268 F.3d 91, 98 (2d Cir. 2001). The court held that the term "total maximum daily load" is "susceptible to a broader range of meanings" and deferred to the EPA's "far-ranging expertise" to elucidate its meaning. *Id*. The Ninth Circuit similarly determined § 1313(d) is unclear on whether TMDLs may be applied to nonpoint sources. *Pronsolino*, 291 F.3d at 1131. There, the court deferred to EPA in its approval of a TMDL with statewide implications for nonpoint sources in California. *Id.*

Here, the district court held, "Congress meant total when it said total" but erroneously held that there are no gaps in § 1313(d)(1)(C). R13. "Total maximum daily load" is ambiguous because it is not defined in the statute and may be interpreted to mean either (1) an unallocated loading requirement, *i.e*., "just a number at the bottom of a receipt," or (2) the sum of discrete maximum daily loads for point and nonpoint sources. *Am. Farm Bureau*, 792 F.3d at 298. Until this case, "[n]o court has

adverted to any problem with the EPA's regulatory interpretation of [total maximum daily load]." *Am. Farm Bureau Fed'n*, 792 F.3d at 296, *cert. denied*, 577 U.S. 1138 (2016). As such, the district court rejected precedent that the U.S. Supreme Court signaled it agrees with. Accordingly, the Court should reverse its misstep and uphold EPA's interpretation of the "total."

Second, the surplusage canon supports EPA's interpretation. It is well established that courts should lean in favor of a statutory construction which renders every word operative. *Nat'l Ass'n of Mfrs. v. DOD*, 138 S. Ct. 617, 632 (2018). Accordingly, Congress would not have included the word "total" unless it intended it to reflect a sum of loading allocations. If Congress intended the TMDL to represent a single loading requirement without reference to specific pollutant sources, it would have used "maximum daily load." Section 1313(d)(1)(C) further implies the TMDL was intended as a sum of discrete loading requirements because the text references a calculation: "a State shall establish . . . the total maximum daily load for those pollutant which the Administrator identifies under section 304(a)(2) as suitable for such calculation." A "calculation" would likewise not be needed unless it was intended to reflect the relationship between two or more parts. The statute's plain language supports a finding of ambiguity because the words "total" and "calculation" would otherwise not be operative.

Third, the CWA's structure supports EPA's interpretation. The courts have established that a term generally means the same thing each time it is used. *United States v. Castleman*, 572 U.S. 157, 174 (2014). In the CWA, the word "total" appears 48 times. In all but one instance, the term clearly connotes a sum of two or more parts. *See, e.g.* § 1254(t) ("total impact on the environment, considering not only water quality, but also air quality, land use, and effective utilization and conservation of fresh water and other natural resources"); § 1311(j)(5) ("effluent limitation modifications may reduce total suspended solids by more than 80%"); § 1314(b)(1)(B) (providing for a calculation of the total cost of the application of technology in relation to effluent reduction benefits). The only instance where the

term may be ambiguous is in § 1254(o)(2), which outlines a procedure to determine whether new policies may be implemented to reduce the "total flow of sewage." Even there, it is unclear whether the term means a sum of individual sewage streams, or the aggregate without reference to each waste stream. As such, "total" is used consistently throughout the CWA and supports EPA's interpretation of the term.

Finally, the legislative history indicates Congress was aware of and approved EPA's interpretation of the CWA when it ratified 1987 amendments to the CWA. Water Quality Act of 1987, Pub. L. No. 100–4, § 404, 101 Stat. 68 (1987). In a 1985 regulation, EPA explained it is "impossible to evaluate whether a TMDL is technically sound and whether it will be able to achieve [WQS] without evaluating component" allocations and "how these loads were calculated." Water Quality Planning and Management, 50 Fed. Reg. 1774, 1775 (Jan. 11, 1985). That same year, EPA promulgated the definition for "total maximum daily load" to include point and nonpoint source allocations. 40 C.F.R. § 130.2(i). Two years after that, Congress amended § 1313(d)(4)(A) to include "or other wasteload allocation established under this section," using language distinctly referencing allocations. § 404, 101 Stat. at 68. The amendment indicates Congress was on notice that EPA interpretated "total" to authorize loading allocations. But even though EPA made changes to the CWA, Congress did not establish a definition of total. The fact that Congress incorporated language specifically referencing EPA's interpretation two years after EPA began applying Congress indicates it was aware of the ambiguity at issue but declined to clarify. Therefore, Congress implicitly ratified EPA's regulations because it intended EPA to fill in the gaps.

Congress left gaps for EPA to fill based on the language, structure, and legislative history of § 1313(d)(1)(C). Therefore, the statute is ambiguous.

B. EPA's interpretation of § 1313(d)(1)(C) is permissible because it has authority to develop a TMDL, and New Union retains authority to implement it

EPA's interpretation of "total" is permissible because it had authority to develop TMDL I under § 1313(d)(1)(C), and New Union retains authority to implement it under § 1313(e). As such, EPA's interpretation of "total" does not violate the principles of comity and federalism in the CWA because New Union retains authority to implement TMDLs.

The statute clearly provides the EPA Administrator discretionary authority to develop a TMDL: "If the Administrator disapproves such identification and load, he shall . . . identify such waters in such State *and establish such loads for such waters as he determines necessary* to implement the [WQS] applicable." § 1313(d)(1)(C) (emphasis added). Despite this delegation of authority to the Administrator, the district court held that § 1313(d) is "an information gathering provision," but nothing more. R13. The statute plainly contradicts the district court's determination.

There are several instances where EPA's interpretation of "total" is appropriately complimented by state implementation: EPA may develop point source reductions through NPDES permitting, but it has no authority to implement specific control measures; only the state does. § 1313(b)(1)(A). A state, then, may use the TMDL wasteload allocation as guidance to establish effluent limits. *Arkansas v. Oklahoma*, 503 U.S. 91, 105–7 (1992). EPA may also encourage certain outcomes with funding and institute civil action against point and nonpoint source polluters, but it has no statutory authority to implement specific control measures. *Am. Farm Bureau Fed'n*, 792 F.3d at 292; R10; § 1281(g) (funding); § 1319(a)(3) (civil action). States may also subject certain nonpoint sources to greater controls than others, or use certain pollution-reduction controls in some instances but not others. *See, e.g.,* 40 C.F.R. 130.2(i); *Sierra Club v. Meiburg*, 296 F.2d 1021, 1025 (11th Cir. 2002).

Further, the district court's comparison of the principles of cooperative federalism in the Clean Air Act and in the CWA does not render EPA's interpretation is impermissible. The district court

correctly noted Congress "deliberately declined to include an EPA supervised state implementation requirement for water quality standards." R13. However, CLW is not arguing that EPA should supervise New Union's TMDL; the implementation plan is not at issue here. CLW is arguing that EPA has authority to set goal posts in the TMDL because the statute expressly provides that authority. § 1313(d)(1)(C). Here, TMDL I sets broad parameters—an annual 35% reduction in point and nonpoint source loading—that New Union can implement in any manner that adequately attains WQS. Setting parameters which the state can then implement is squarely within EPA's authority under the CWA.

The TMDL provision of the CWA is ambiguous, and EPA's interpretation is permissible because it preserves the principles of comity and federalism that Congress intended for the CWA. TMDL II should be vacated, and TMDL I should be reimplemented because EPA's construction of "total" does not violate § 1313(d)(1)(C).

III. The Court should affirm summary judgment for CLW on its claim that EPA erroneously interpreted the minimum statutory requirements in § 1313(d)(1)(C)

CLW is entitled to summary judgment on its challenge to EPA's interpretation of § 1313(d)(1)(C) because the statute's plain language establishes three requirements for TMDLs which EPA ignores. R15. An agency's construction of a statute it administers is reviewed under *Chevron*, as explained above. Under *Chevron*, the Court "must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 843. Here, the unambiguous language of § 1313(d)(1)(C) insists that TMDLs regulate pollution on a "daily" basis, allow for "seasonal variations," and are "established at a level necessary to implement the applicable WQS." § 1313(d)(1)(C). As the district court recognized, EPA incorrectly interpreted the statute to legitimize TMDL I, which does not meet any of these three requirements because it: regulates pollution on an annual basis, makes no attempt to allow for seasonal variations, and is insufficient to ensure that Lake Chesaplain will meet WQS for five years. Any one

of these three violations, discussed in separate subsections below, is grounds for the Court to affirm summary judgment for CLW.

A. Section 1313(d)(1)(C) unambiguously requires TMDLs to establish total maximum "daily" loads, and it is undisputed that TMDL I does not limit daily pollution

First, EPA's construction of § 1313(d)(1)(C) is incorrect because it does not give effect to the word "daily." EPA may not adopt a TMDL that regulates pollution on an annual basis. *Friends of the Earth*, 446 F.3d at 146.

Chevron and the canon against surplusage require courts to give effect to every word in a statute. Under *Chevron* step one, the Court looks to the plain language of the statute to determine Congress' intent. "If the intent of Congress is clear, that is the end of the matter." *Chevron*, 467 U.S. at 842. While "[a]bsurd results are to be avoided" when constructing a statute, an unambiguous expression of intent "ordinarily be regarded as conclusive." *United States v. Turkette*, 452 U.S. 576 (citation and internal quotations omitted). Likewise, the canon against surplusage precludes interpretations of a statute that ignore words. The court should give effect to every clause and word of a statute, avoiding any construction which implies that the legislature was ignorant of the meaning of the language it employed. *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 632.

Section 1313(d)(1)(C) requires TMDLs to establish "daily" limits on pollution for impaired waterbodies. Applying *Chevron* step one, the D.C. Circuit recognized that the word "daily" is an unambiguous expression of Congress' intent:

> Nothing in this language even hints at the possibility that EPA can approve total maximum "seasonal" or "annual" loads. The law says "daily." We see nothing ambiguous about this command. "Daily" connotes "every day." *See* Webster's Third New International Dictionary 570 (1993) (defining "daily" to mean "occurring or being made, done, or acted upon every day"). Doctors making daily rounds would be of little use to their patients if they appeared seasonally or annually. And no one thinks of "[g]ive us this day our daily bread" as a prayer for sustenance on a seasonal or annual basis. Matthew 6:11 (King James).

Friends of the Earth, 446 F.3d at 144. Since "daily" has its usual meaning in § 1313(d)(1)(C), the court held that EPA must adopt a TMDL that regulates pollution on a daily basis. *Id*.

Likewise, the canon against surplusage prevents constructing § 1313(d)(1)(C) in a way that does not give effect to "daily." Courts are "obliged to give effect, if possible, to every word Congress used." *Nat'l Ass'n of Mfrs.* 138 S. Ct. at 632. Here, EPA's interpretation of the statute ignores "daily," so EPA's construction of the statute was incorrect. If the statute is constructed such that TMDLs can regulate pollution on an annual basis, then "total maximum daily load" has the same meaning as "total maximum load" and "daily" has no effect.

Although "total maximum daily load" is an ambiguous phrase, the word "daily" has an unambiguous meaning. Like CLW, the *Muszynski* plaintiff challenged EPA's adoption of a TMDL because the TMDL did not regulate pollution on a daily basis. 268 F.3d at 97. The court found that the phrase "total maximum daily load" was "susceptible to a broader range of meanings" than plaintiffs claimed. *Id.* at 98. However, under *Chevron*, *Muszynski* should have asked "whether Congress ha[d] spoken directly to the precise question at issue." *Chevron*, 467 U.S. at 842; *see also Am. Farm Bureau Fed'n*, 792 F.3d at 294 ("In framing 'the precise question at issue,' we ask, 'whether the statute unambiguously forbids the Agency's interpretation.'") (quoting *Barnhart v. Walton*, 535 U.S. 212, 217–18 (2002)). Congress spoke directly to the precise question at issue in *Muszynski* because § 1313(d)(1)(C) requires EPA to adopt total maximum "daily" loads. § 1313(d)(1)(C). Therefore, *Muszynski* erred by not confining its analysis to Congress' unambiguously expressed intent.

Further, *Muszynski* was flawed because it did not correctly apply *Turkette*, 452 U.S. 576. *Muszynski* relied on the rule that "absurd results are to be avoided" when constructing a statute. *Muszynski*, 268 F.3d at 98 (citing *Turkette*, 452 U.S. at 580). The court concluded that requiring TMDLs to establish daily limits for phosphorous would be absurd because "for some pollutants,

effective regulation may best occur by some other periodic measure than a diurnal one." *Id.* at 99. However, under *Turkette*, "if the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." 452 U.S. at 580 (citation omitted). *Muszynski* does not cite any legislative history suggesting that Congress intended to allow for TMDL submissions to regulate pollution on an annual basis. And *Muszynski* does not point to any extraordinary circumstances that suggest that the word "daily" should not be conclusive. To the contrary, "establishing daily loads makes perfect sense for many pollutants." *Friends of the Earth*, 446 F.3d at 146. Hence "daily" should be regarded as conclusive.

The *Friends of the Earth* court rejected *Muszynski*'s finding of absurdity because the D.C. Circuit applies a heightened burden for agencies seeking to demonstrate absurdity. In the D.C. Circuit, "for the EPA to avoid a literal interpretation…it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it." *Id*. at 146. This burden aligns with *Chevron* and *Turkette* because it presumes that unambiguous language in a statue is conclusive. Here, since EPA cannot meet this burden, interpreting § 1313(d)(1)(C) to require daily pollution restrictions is not absurd.

Section 1313(d)(1)(C) does not permit EPA to adopt an annual maximum load in place of a TMDL because Congress unambiguously expressed its intent for "daily" regulations in the plain language of the statute. Because it is undisputed that TMDL I does not regulate pollution on a daily basis, EPA erred as a matter of law by approving it. Accordingly, the Court should grant summary judgment for CLW on its challenge to TMDL I.

B. The plain language of § 1313(d)(1)(C) requires TMDLs to allow for seasonal variations, and the record does not reflect that EPA demonstrated how TMDL I does so

Alternatively, the Court should affirm summary judgment for CLW because § 1313(d)(1)(C) requires TMDLs to allow for seasonal variations in water quality. Here, CLW is entitled to summary judgment because nothing in the record reflects that EPA can meet its burden to show that TMDL I allows for seasonal variations.

Section 1313(d)(1)(C) explicitly requires TMDLs to allow for seasonal variations. Applying *Chevron*, the Court should defer to the plain language of the statute. 467 U.S. at 842–843. Here, the statute says that TMDLs "shall be established at a level necessary to implement the applicable water quality standards with *seasonal variations*." § 1313(d)(1)(C) (emphasis added). Congress unambiguously required TMDLs to allow for seasonal variations in water quality, and because "the intent of Congress is clear, that is the end of the matter." *Chevron*, 467 U.S. at 842. Further, EPA has the burden of showing that TMDL I allows for seasonal variations in water quality. Although *Muszynski* disagreed with the lower court's interpretation of "daily," the court still remanded because it found that EPA had failed to show how the TMDL expressed in annual terms allowed for seasonal variations. 268 F.3d at 99.

Here, like in *Muszynski*, nothing in the record reflects that EPA explained how TMDL I allows for seasonal variations. Therefore, EPA cannot genuinely dispute that TMDL I fails to meet the seasonal variations requirement in the statute, and CLW is entitled to summary judgment.

C. Section 1313(d)(1)(C) requires TMDLs to ensure that the impaired waterbody will meet WQS, so the restrictions in TMDL I are insufficient

Alternatively, the Court should affirm summary judgment for CLW because § 1313(d)(1)(C) requires TMDLs to implement restrictions that are sufficient to ensure the impaired waterbody will meet and continue to meet WQS. R15. Applying *Chevron*, the Court should look to the plain language

of the statute and, if necessary, consider the underlying purpose of the statute. Here, because TMDL I will not ensure that Lake Chesaplain will meet WQS upon implementation, CLW is entitled to summary judgment on its challenge to TMDL I.

Neither the plain language nor the underlying purpose of § 1313(d)(1)(C) support a construction of the statute that allows EPA to adopt a TMDL that is insufficient to ensure the impaired waterbody will meet WQS upon implementation. First, the plain language of the statute requires that TMDLs are "established at a level necessary to implement the applicable water quality standards" § 1313(d)(1)(C). On its website, EPA acknowledges that TMDLs should ensure "the waterbody will *meet and continue to meet* [WQS] for that particular pollutant." EPA, *Overview of Total Maximum Daily Load*, Impaired Waters and TMDLS, https://www.epa.gov/tmdl/overview-total-maximum-daily-loads-tmdls (last visited Nov. 22, 2021). Second, the purpose of the CWA was to ensure that WQS were achieved no later than July 1, 1977. *See* 33 U.S.C. § 1311(b)(1)(C). And the deadline for achievement of loading reductions cannot be extended by administrative action. *See Bethlehem Steel Corp.v. Train*, 544 F.2d 657, 661 (3d Cir. 1976). Therefore, EPA may not adopt a TMDL that will not lead the impaired waterbody to meet WQS for five years after it is adopted.

TMDL I will not ensure that Lake Chesaplain meets WQS because it uses a phased approach and aims for a percentage-based reduction in loading. Even if successful, TMDL I will not result in Lake Chesaplain meeting WQS until 2024. Therefore, EPA's construction of § 1313(d)(1)(C) contradicts the plain language and underlying purpose of the Clean Water Act requiring TMDLs to ensure that the impaired waterbody meets WQS upon implementation.

IV. The Court should reverse summary judgment for EPA on CLW's claim that reasonable assurances are required

EPA's decision to not require reasonable assurances that the BMPs in the TMDL for Lake Chesaplain would be implemented was arbitrary and capricious because EPA failed to consider important aspects of the problem and acted contrary to its own interpretive document without a reasoned explanation. BMPs are used to achieve nonpoint source reductions. 40 C.F.R. § 130.2(i). EPA often requires reasonable assurances that BMPs will be implemented to help understand if the TMDL will reach water quality criteria and if EPA should approve the TMDL, "as it would surely be arbitrary or capricious for the EPA to approve a plan that a state is incapable of following." *Am. Farm Bureau Fed'n*, 792 F.3d at 307. *American Farm* characterized EPA's choice to require reasonable assurances in the Chesapeake Bay TMDL as the agency "exercis[ing] 'reasoned judgment' in evaluating the states' proposed standards," consistent with the authority granted to EPA by CWA. *Id.* at 300 (citing *Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079, 1087 (D.C. Cir. 2014)).

The arbitrary and capricious standard applies when a court reviews an agency's findings under the APA. 5 U.S.C. § 706(2)(A). Here, the arbitrary and capricious standard applies because the Court is reviewing EPA's finding that reasonable assurances were not required.

An agency's findings are arbitrary and capricious if the agency, among other actions, "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Under this standard, the Court may not substitute its judgment for that of the agency. *Id.* Rather, the Court should determine if the agency has considered the relevant factors and articulated a rational connection between the facts found and choice made. *Bowman Transp., Inc., v. Ark.–Best Freight Sys.*, 419 U.S. 281, 285–86 (1974). This analysis is "searching and careful" but "narrow." *Id.* at 285. If an agency does not justify its decision with relevant facts, it acted arbitrarily and capriciously.

For instance, Office of Surface Mining (OSM) arbitrarily and capriciously amended the rule governing West Virginia's surface coal mining program when it deleted the definition of "cumulative impact" without considering how the deletion would impact ecosystems and the national mining program's effectiveness. *Ohio River Valley Env't Coal., Inc. v. Kempthorne*, 473 F.3d 94, 99, 103 (4th Cir. 2006). As such, OSM failed to consider an important part of the problem and provide a reasoned analysis of its decision. *Id.* Conversely, in *Waterkeeper Alliance, Inc. v. EPA*, EPA did not act arbitrarily and capriciously in refusing to adopt best available technology standards for CAFOs because EPA collected extensive data, research, and public comment before reaching its decision. 399 F.3d 486, 513 (2d Cir. 2005). There, EPA used information to justify its decision and addressed other information that contradicted its decision, so EPA considered important parts of the problem, made a rational connection between the facts found and decision made, and explained its decision. *Id.*

Applying the arbitrary and capricious standard here, EPA failed to consider that: (1) the majority of phosphorus loading in Lake Chesaplain is from nonpoint sources, and (2) New Union has demonstrated an unwillingness to regulate nonpoint source pollutants. Additionally, because EPA's interpretive document requiring reasonable assurances receives *Skidmore* deference, EPA's self-imposed requirement is the "starting point" for its inquiry. As such, the Court should consider the facts of the problem in light of EPA's self-imposed policy of requiring reasonable assurances and, at a minimum, hold that EPA acted arbitrarily and capriciously because EPA did not justify its departure from that policy. Therefore, the Court should reverse summary judgment for EPA and remand to EPA to revise TMDL I.

A. EPA arbitrarily and capriciously ignored two important aspects of the problem in adopting TMDL I

EPA acted arbitrarily and capriciously because it entirely ignored important parts of the problem in deciding not to require reasonable assurances that BMPs would be implemented.

Accordingly, EPA's decision is not rationally connected with the facts found. Because EPA failed to consider these important parts of Lake Chesaplain pollution problem, EPA acted arbitrarily and capriciously. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

1. EPA arbitrarily and capriciously ignored the fact that nonpoint sources make up the majority of pollutant loading in Lake Chesaplain

First, EPA failed to consider the significance of the nonpoint source pollutants (including CAFOs) in Lake Chesaplain. EPA has not shown that it exercised reasoned judgment in determining the TMDL would attain Lake Chesaplain's WQS and satisfy the requirements of § 1313(d). Absent such analysis, EPA acted arbitrarily and capriciously.

First, EPA acted arbitrarily and capriciously because it ignored the significance of the nonpoint source pollutants in the total pollution loading of Lake Chesaplain in not requiring reasonable assurances. As held in *Waterkeeper Alliance*, EPA, at a minimum, needed to collect and assess the research and data relevant to the realistic pollution reductions achievable by nonpoint source pollutants. 399 F.3d at 513. Such an analysis comports with the reasoned judgment standard from *Center for Biological Diversity*. 749 F.3d at 1087. Instead, EPA acted like OSM in *Ohio River* in failing to assess the impact of not requiring reasonable assurances on the achievement of the WQS and CWA goals, and in failing to provide a reasoned analysis of its decision. 473 F.3d at 99, 103.

The record indicates that EPA only considered public and industry comments, which are insufficient to holistically assess whether reasonable assurances are needed in a TMDL. EPA should have considered the following facts: the nonpoint source pollutants in Lake Chesaplain make up nearly half of the lake's total phosphorus loading and nearly 60% of the loading from human sources. As such, relieving nonpoint source polluters of their obligations to reduce phosphorus loading unjustifiably shifts the "burden of meeting water quality standards" to point source polluters. *Am. Farm Bureau Fed'n*, 792 F.3d at 310. Further, even if the point source polluters reduced their phosphorus loading to

zero, Lake Chesaplain would not meet the maximum phosphorus loading goal (120 mt); phosphorus loading only would drop from 180 mt to 147.7 mt. R8, R9. Since the point sources are unlikely to reduce their loading to zero, let alone the 35% decrease required by the TMDL, the realistically achievable reductions in loading from only point sources will certainly not achieve the 120 mt target. R8, R9.

In a narrow legal sense, not reaching phosphorous reduction goals means the TMDL fails to reach the WQS. More importantly, failing to reach the phosphorus reduction goal perpetuates the ongoing risk that people will get sick from drinking or swimming in the water, and continues the downward trend of fish populations, ecosystem health, tourism dollars, and property values. R7. EPA failed to adequately consider these consequences which stem from not requiring reasonable assurances, just as OSM in *Ohio River* failed to adequately consider the ecosystem and programmatic impacts of deleting "cumulative impacts." 473 F.3d at 103. Accordingly, the Court should hold that EPA arbitrarily and capriciously failed to consider the significance of nonpoint source pollutants in Lake Chesaplain and to provide a reasoned analysis in deciding not to require reasonable assurances.

2. EPA arbitrarily and capriciously ignored the fact that New Union has been unwilling to regulate nonpoint sources

EPA also arbitrarily and capriciously failed to consider New Union's history of refusing to regulate nonpoint sources and its impact on achieving the Lake Chesaplain WQS. Notably, New Union did not submit a TMDL to EPA when it adopted the water quality criteria for Lake Chesaplain in 2014, as required by § 1313(d). R8. CLW recognized the gravity of this omission in achieving water quality standards and sent a notice of intent to sue New Union and EPA. R8. Additionally, despite knowing that phosphorus loading was causing the pollution problem in Lake Chesaplain since 2012 when the Commission issued its report, New Union could have began to modify state permits for nonpoint sources to begin to ameliorate the phosphorus loading problem; it did not need a federally-authorized

program to do so. R8. The state could have implemented even conservative phosphorus limits while DOFEC and EPA researched, drafted, and reviewed the WQS and TMDL. Its refusal to do so combined with its initial refusal to craft a TMDL indicates an unwillingness to regulate phosphorus, which EPA should have considered in determining whether reasonable assurances were necessary for the achievement of the Lake Chesaplain WQS.

New Union's track record of refusing to regulate nonpoint source polluters has continued even after EPA approved TMDL I. Notably, New Union has not modified the CAFOs' nutrient management permits to incorporate any phosphorus reduction measures. R10. This is particularly problematic since CAFO manure spreading contributes 64% of nonpoint source phosphorus loading and more than a third of total phosphorus loading in Lake Chesaplain. R10. Without New Union's commitment to implement BMPs, nonpoint pollution reductions are unlikely to occur and WQS are unlikely to be met.

In short, EPA approved a TMDL that New Union has proven it is "incapable of following." *Am. Farm Bureau Fed'n*, 792 F.3d at 307. Furthermore, if New Union refuses to play its part, the CWA's cooperative federalism structure becomes irrelevant, since EPA has no authority to implement nonpoint source pollution controls in lieu of the states. Accordingly, EPA's decision not to require reasonable assurances that BMPs would be implemented was arbitrary and capricious because EPA failed to New Union's unwillingness to regulate nonpoint sources. As such, the Court should grant summary judgment in favor of CLW, vacate the TMDL, and remand to EPA to amend the TMDL to require reasonable assurances.

3. The district court did not make specific findings to satisfy arbitrary and capricious review and applied inapplicable case law to justify its decision not to require reasonable assurances

The district court did not make the proper findings to affirm EPA's decision, and summary judgment should be overturned. Below, the district court stated the arbitrary and capricious standard,

rebuffed CLW's reliance on EPA's TMDL interpretive document to prove EPA's unreasonable interpretation, and stated its conclusion of reasonableness based on inapplicable law. R16. It did not, though, analyze whether EPA satisfied arbitrary and capricious review. Specifically, it neglected to analyze whether EPA considered important aspects of the problem and justified its decision based on the facts found.

The district court cites to *Sierra Club v. Meiburg* to justify its conclusion that EPA did not need to require reasonable assurances; however, *Meiburg*'s focus is on TMDL implementation, not creation, and thus is not controlling. 296 F.2d 1021. *Meiburg* concerned a consent decree for EPA to establish TMDLs for the state of Georgia. *Id.* at 1027. Two years after EPA established the TMDLs, Sierra Club sued EPA, arguing that the agency needed to re-open the decree so that EPA would be compelled to prepare implementation plans for the 124 TMDLs the agency had established. *Id.* at 1028. The court agreed with EPA that it was not obligated to prepare implementation plans for, or to implement the TMDLs under, the consent decree. *Id.* at 1034.

Meiburg's focus on actual implementation of the TMDL can be distinguished from the present case. The present case concerns not the blueprints for implementation, which are governed by § 1329, but rather "informational tools" designed under § 1313(d) that are actualized through implementation plans. *See City of Arcadia*, 265 F. Supp. 2d at 1144–45 (describing TMDLs as "a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source controls"); *Bravos*, 306 F. Supp. 2d at 52, 56 (distinguishing between the information gathered at the TMDL approval phase to inform whether EPA should approve the TMDL and the state's plan to implement the TMDL). The primacy of EPA in approving TMDLs and of the states in crafting and executing implementation plans is emblematic of the larger cooperative federalism framework that underlies TMDLs. *Am. Farm Bureau Fed'n*, 792 F.3d at 302 ("[T]he term

"total maximum daily load" exists within a cooperative federalism framework and that the area being regulated is clearly within the agency's jurisdiction."). Requiring reasonable assurances that BMPs will be implemented respects that element of cooperative federalism and is just here.

Based on the case law above, reasonable assurances are means to evaluate the efficacy of the initial TMDL plan, not mandate the actual implementation and compliance by nonpoint sources, as the district court asserts. As such, *Meiburg* is not applicable and does not absolve EPA of analyzing the important aspects of the problem identified in this section.

B. The Court should provide deference to EPA's guidance document, which self-imposes a requirement that TMDLs include reasonable assurances that BMPs will be implemented

EPA arbitrarily and capriciously disregarded its own interpretive document in deciding not to require reasonable assurances. EPA's interpretive document directs EPA to require reasonable assurances for BMPs when nonpoint source reductions are used as credits to reduce the stringency of point source controls. U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA 440/4-91-001, GUIDANCE FOR WATER QUALITY-BASED DECISIONS: THE TMDL PROCESS (1990) ("TMDL Process"). TMDL Process is afforded deference under *Skidmore*, so Court should use TMDL Process as guidance in determining the arbitrariness and capriciousness of EPA's decision. Since EPA acted contrary to its own policy on TMDLs and did not explain why given the facts of the Lake Chesaplain problem, EPA acted arbitrarily and capriciously.

TMDL Process clarifies the requirements of § 1313(d) and is an effective tool in managing point and nonpoint source pollutants. TMDL Process at Foreword. Specifically, TMDL Process directs EPA to require reasonable assurances that BMPs will be implemented and maintained when credits for nonpoint pollution reduction are used to make point source pollution reductions less stringent. *Id*. at 24; *see also id.* at 2 ("[B]efore approving a TMDL in which some of the load reductions are allocated

to nonpoint sources in lieu of additional load reductions allocated to point sources, there must be specific assurances that nonpoint source reductions will in fact occur."). Examples of assurances include the application for or utilization of local ordinances or grant conditions. *Id*. at 24. In some cases, assurances require the TMDL to include a schedule for the implementation of control mechanisms, monitoring, and assessments of standards attainment. *Id*. at 2; *see, e.g., Am. Farm Bureau Fed'n*, 792 F.3d at 292 (requiring reasonable assurances and setting deadlines for water quality attainment).

1. The TMDL Process receives strong *Skidmore* deference

The Court should afford *Skidmore* deference to TMDL Process and conclude that, pursuant to its own interpretive document, EPA erred by not requiring reasonable assurances that BMPs for nonpoint sources would be implemented.

To determine whether provide an agency's interpretive document receives deference, courts must engage in a four-part analysis. First, the Court must decide whether Congress intended the agency to interpret the statute. *King v. Burwell*, 576 U.S. 473, 485–86 (2015). If the court finds Congress intended the agency to interpret the statute, the court then determines whether Congress spoke clearly and directly to the issue under *Chevron*, as described *supra*. If Congress spoke clearly or directly, the court interprets the meaning of the statute, and the agency must abide by that meaning. *Id.* at 842–43. If not, the court decides whether to apply *Chevron* or *Skidmore* deference. *United States v. Mead Corp*., 533 U.S. 218, 226–227 (2001).

First, courts have "recognized the EPA's authority to fill the [CWA's] considerable gaps on how to promulgate" a TMDL. *Am. Farm Bureau Fed'n*, 792 F.3d at 296 (citing *Pronsolino*, 291 F.2d at 1131 ("[T]he EPA has the delegated authority to enact regulations carrying the force of law regarding the identification of § [1313](d)(1) waters and TMDLs."")). Second, Congress intended EPA to interpret the CWA because its delegations to EPA are broad. § 1251(d) ("[e]xcept as otherwise expressly

provided in this chapter, the Administrator of the [EPA]...shall administer this chapter."). Additionally, the CWA does not speak directly or clearly to whether reasonable assurances are required. Thus, the Court may decide whether the TMDL Process receives *Chevron* or *Skidmore* deference.

Generally, *Chevron* applies to legislative rules adopted through notice-and-comment, formal adjudication, or other methods with "the force of law." *Mead Corp.*, 533 U.S. at 226–227. Nonlegislative rules and interpretations generally receive *Skidmore* deference. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944). That said, the applicable standard "var[ies] with circumstances," depending on: (1) the complexity of the statute and its administration; (2) the agency's expertise; (3) the degree of the agency's care, thoroughness, consistency, and formality in the interpretation process; (4) the quality of the agency's analysis; and (5) any indicia of Congress' intended level of deference. *Id.* at 140; *Mead Corp.*, 533 U.S. at 227–28.

Here, the Court should apply *Skidmore* because the factors collectively weigh against *Chevron* deference. First, § 1313(d) is as complex and technical. *See Pronsolino*, 291 F.3d at 1133 (Section 1313(d) is an "intricate statutory scheme" that addresses "technically complex environmental issues."). Second, EPA has the expertise required to interpret the statute's complexities. *Id.* at 1133 (noting that EPA's delegated regulatory authority and expertise in interpreting a "complicated, science-driven statute" justify the court's utilization of EPA's CWA interpretation). Third, the TMDL Process is thorough, constituting 62 pages of detailed instructions on how to best design a TMDL under § 1313(d). TMDL Process at 1. Further, EPA has not changed its policy on reasonable assurances as a means to fulfill § 1313(d)(1)(c)'s requirement that a TMDL is set a level necessary to implement WQSs in the 30 years. On the other hand, the TMDL Process did not go through notice and comment and does not, on its own, uniformly establish legal rights or obligations. TMDL Process. *See Nw. Ecosystem All. v.*

Fish & Wildlife Serv., 475 F.3d 1136 (9th Cir. 2007) (applying *Chevron* to a U.S. Fish & Wildlife Service handbook adopted through notice and comment).

Further, the Court should find the document's power to persuade high and factor in EPA's policy of requiring reasonable assurance requirements in its review of the case. Even the district court admitted that deference to the reasonable assurances standard would render EPA's decision arbitrary and capricious.

2. Deference to the TMDL Process renders EPA's decision to adopt the Lake Chesaplain TMDL arbitrary and capricious

The Court should provide deference to TMDL Process, which, as the district court admits, renders EPA's decision arbitrary and capricious. Interpretive documents receiving *Skidmore* deference "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140. The court should treat policy statements as "a safe starting point from which deviations may be made based on an evidentiary record." *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 41 (D.C. Cir. 1974); *see also Lopes v. Dep't of Social Servs.*, 696 F.3d 180, 186–188 (2d Cir. 2012) (relying on the agency's expertise expressed in its guidance documents to begin interpreting an unresolved interpretation of Medicaid eligibility).

The Court should similarly use the TMDL Process as a "starting point" to begin its inquiry into the arbitrariness and capriciousness of EPA's decision because the TMDL Process is a well-reasoned statement of agency policy that conforms with applicable law. *Id.* at 41. From that starting point—which, contrary to EPA's actions, says EPA should require BMPs when nonpoint sources credit point source reductions—the Court should then assess whether the facts of the problem justify a deviation from the agency's policy. *Pac. Gas & Elec. Co.*, 506 F.2d at 41.

Here, as described *supra*, the facts necessitate reasonable assurances and foreclose a reasonable explanation for EPA's departure from its self-proclaimed policy. In fact, EPA does not attempt to rebut

this reality, and instead has operated as if TMDL Process does not exist. *Fed. Commc'ns Comm'n v. Fox Tele*., 556 U.S. 502, 516 (2009) (holding that if an agency reverses course on a long-standing policy, it must, at minimum, provide a "reasoned explanation" for changing course). Without as much as an attempt to justify its departure, EPA has not met the low bar of arbitrary and capricious review that requires the agency to articulate the reasons for its decision. As such, EPA's decision to neither require reasonable assurances nor provide a reasoned justification for its departure from TMDL Process was arbitrary and capricious.

CONCLUSION

The Court should reverse summary judgment for New Union and affirm summary judgment for CLW. The issue is ripe for review because CLW members will experience hardship if the issue is not resolved, and court intervention will not interfere with EPA action. The Court should reverse summary judgment for New Union because EPA has authority to develop a TMDL with loading allocations for individual sources, so long as the state implements the loading allocations. The Court should affirm summary judgment for CLW because TMDL I does not meet three requirements for TMDLs in § 1313(d)(1)(C): TMDLs must regulate daily pollution, must allow for seasonal variations, and must ensure that the impaired waterbody will meet WQS. If the Court does not affirm summary judgment for CLW, it should reverse summary judgment for EPA and remand for further proceedings because EPA was required to obtain reasonable assurances that the BMPs would be implemented.